IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

MICHAEL PARSONS, et at.,
Plaintiff,

vs.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL & HEALTH SERVICES, and DENNIS BRADDOCK, Secretary of Social & Health Services, in his official capacity,

Defendant.

No. 03-2-12424-9 SEA

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This case has come before the court on plaintiffs' motion for partial summary judgment on two distinct issues. The court must decide 1) whether the legislature has violated the "two subject" rule in violation of Art. II, Sections 19 and 37 of the Washington State Constitution, and 2) whether the legislature acted beyond the scope of its authority, or *ultra vires* in enacting legislation permitting the continued "down-sizing" of Fircrest School. Because this motion is being made before a full hearing can be heard, the court is required to deny the plaintiff's motion and allow the matter to proceed to trial unless the plaintiffs can show beyond a reasonable doubt that the legislature violated the Constitution. The court also cannot decide disputed issues of fact without giving each party a right to a full hearing. Because the plaintiffs are seeking to prevent the State

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from putting on witnesses and having a full hearing, the court must also base this ruling on what the State asserts it will prove if given a chance to proceed to trial.

It is the role of the legislature, not the court, to set policy and decide how tax dollars are to be spent. Therefore, the court may only intervene in such a case as this where the legislature has clearly violated the Constitution. The Court's personal sympathies for the residents of Fircrest and their families cannot allow it to substitute its own judgment for that of the duly elected representatives of the citizens of Washington.

This case involves the downsizing of Fircrest School located in Shoreline, Washington. It is uncontested that Fircrest along with other Residential Habilitation Centers (hereinafter "RHCs") has been downsizing its institutional population since 1966. In 1967 the developmentally disabled population was well over 4,000 (4,145 residents),a population which has steadily declined to over 1,000 individuals presently.

The State asserts that the following facts will be proven if they are allowed to have a full trial. Nationally, over this time period, a strong philosophical shift has occurred toward the de-institutionalization of the mentally ill and developmentally disabled, placing them in community assisted living with a regulated amount of benefits and services. Proponents of deinstitutionalization argue that this has allowed society's most vulnerable individuals to achieve great gains in individual independence toward self-care, with varying degrees of assistance, and in the freedom to pursue day to day activities, such as shopping, going to the movies, socializing with friends and family, marrying or owning a pet.

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The plaintiffs challenge the legislative decision that occurred on June 4, 2003 when the biennium budget for 2003-2005 was approved, and the legislature specifically permitted the continued down-sizing of Fircrest from approximately 256 residents to 200 residents by March 2004. The plaintiffs challenge this legislation by specifically attacking the provisions of Engrossed Substitute Senate Bill 5404 (hereinafter "ESSB 5404"). The plaintiffs claim that the legislature acted improperly by reducing the funding of Fircrest in the 2003-2005 biennial budget and thereby altering Fircrests' claimed "permanent" status (see, RCW 71A.20.020). The plaintiffs also assert that the downsizing intended by this budget act exceeded the legislature's authority.

This court is particularly sensitive to the needs of the mentally ill and developmentally challenged individuals who make up over 30,000 people in the state. In delivering the court's opinion today, this court acknowledges and recognizes society's most vulnerable citizens who are being impacted by this legislative decision that occurred on June 4, 2003. The U.S. Supreme Court itself acknowledged this national trend when it explicitly approved deinstitutionalization in *Olmstead. v. L.C. by Zimring,* 527 U.S. 581, 119 S.Ct. 2176 (1999). In that case, the plaintiffs were two persons who were developmentally disabled and/or had mental illnesses. Both had a history of treatment in institutions. Both remained institutionalized even after their treating professionals found them ready for transition to a community-based setting. They sued, alleging that the state's failure to place them in a community-based program, determined to be appropriate by their treatment providers, violated Title II of the Americans with Disabilities Act (ADA). The Supreme Court held that unjustified segregation of persons with disabilities was a form of discrimination prohibited by the ADA.

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Specifically the Supreme Court held:

> Recognition that unjustified isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of person who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, education for advancement or cultural enrichment.

527 U.S. at 600-01.

This process that has been recognized and upheld by the U.S. Supreme Court is consistent with the overall downsizing of RHCs that has occurred throughout the country and around Washington State. Simply stated, under title II of the American Disabilities Act, states must place individuals with disabilities in community settings rather than in institutions whenever 1) the state's treatment professionals determine it is appropriate; 2) the individual does not oppose it; and 3) the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with disabilities. This is the law that applies in Washington and throughout the United States. The *Olmstead* ruling does not require states to stop providing services for people in institutions, if they cannot handle or benefit from community settings.

The evolution of this process is borne out statistically. For example, eight (8) states and the District of Columbia have closed all of their large, state-run Developmentally Disabled institutions. Twenty-nine (29) other states have closed at least one or more of the DD institutions. Of the thirteen (13) states that have not closed any DD institutions, five of them have only one large institution.

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Also of note, of the 349 large, state-run DD institutions operating between 1960-2001, 47 percent (164) have closed.'

The institutional patterns of Washington's closest neighbors, Idaho, Oregon, and California, also have followed this national trend. Idaho has not closed an institution, but it only has one; Oregon has closed two of its three institutions; and California has closed six of its twelve institutions.[2] After the *Olmstead* ruling was issued by the Supreme Court, Governor Locke designated DSHS as the lead state agency for *Olmstead* planning in Washington State. Since 1990, when DSHS began emphasizing community placement, Washington's *Olmstead* Plan has been subject to continuous planning and change. Stakeholders, providers and consumers have all been able to participate in budget requests to accelerate on-going processes and programs. The aim has not been to diminish services to the developmentally disabled but to increase the development of independence through an individualized approach to each person whether placement occurs in a community based program or in an institutional setting.

What occurred as a result of the June 2003 biennium is not in dispute. The Legislature determined that Fircrest had to be downsized in early 2004 by reducing the resident population of Fircrest and provide a transition plan to accomplish the downsizing. While the downsizing of Fircrest occurred as a result of the legislature, the increase in other RHC budges was to occur simultaneously as the state consolidated the anticipated vacancies. Fifty-six residents are to be moved from Fircrest to either another RHC or into a less restrictive community placement. The residents will continue to be provided with services and benefits in either placement. When the legislature enacted ESSB 5404, it did not reduce provisions that effect individuals' health, safety and

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welfare. The legislature's actions are consistent with both the national and state trend discussed above. These recognized goals are to allow these vulnerable individuals to gain more independence by living in community-based housing while simultaneously protecting their rights under both state and federal law, and to provide benefits and services to assist these individuals on the most fundamental levels of daily living needs whether it is an RHC or in a community setting. There is *no* reduction of services.

The plaintiffs' argument that the budget acts violated the two-subject prohibition under the State constitution under Article II, sections 19 and 37 fails. It is undisputed that the biennium is for the period 2003-2005. It requires the downsizing of Fircrest, but also mandates that there be minimal disruption to clients, employees, and the developmental disabilities program. At the same time, DSHS was to determine ways to maximize federal reimbursements during the downsizing process, meet and confer with affected employees, keep appropriate committees of the legislature apprised through regular reports as to the work plan regarding the downsizing effort. During this process DSHS is to offer residents of Fircrest the choice of community-based placement near their families or guardians, or placements at other state institutions offering services equivalent to those they currently receive at Fircrest. While there has been allusion to closing Fircrest, this is not to occur until *after* the 2003-2005 biennium, and it is for future legislative sessions to address. Plaintiffs claim that somehow the legislature lacked authority to decrease the size of Fircrest in the 2003-2005 biennium. This is not about the closure of Fircrest, nor is it about the reduction of services provided to the developmentally disabled. While plaintiffs argue that the downsizing and the prospective closing of Fircrest (after 2005) are two subjects and therefore, violative of Article II, section 19; only the downsizing was to be implemented during the current biennium while closure is to occur in

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subsequent bienniums. This is a critical distinction and does not in and of itself violate the two-subject prohibition under the state Constitution. Plaintiffs insist however, that the implementation of downsizing and contemplation of closure after 2005 somehow violates the two-subject rule. The legislature's discussion and prospective intention of closing Fircrest after 2005 does not rise to a Constitutional affront.

Both plaintiffs and the defendants agree that summary judgment is appropriate when, as here, there are no material issues of fact; the issue before the court is a question of law. The plaintiffs have failed to demonstrate that the legislative act (ESSB 5404) is unconstitutional beyond a reasonable doubt. *Pierce County v. State,* 150 Wn.2d 422, 430,(2003), quoting *Amalgamated Transit Union Local 587v. State,* 142 Wn.2d 183,205 (2000).

While plaintiffs argue that the bill (ESSB 5404) violates Article 11, section 19 of the Washington State Constitution (prohibiting an appropriation bill if it defines rights or alters existing laws), they have been unable to present authority to demonstrate that the bill effects existing law. The test is three-part in nature: 1) it has been treated in a separate substantive bill in the past; 2) its duration extends beyond the two year time period of the budget; and 3) the policy defines rights or eligibility for services. *Retired Pub. Employees v. Charles,* 148 Wn.2d 602, 629 (2003), citing *Wash. State Legislature v. State,* 139 Wn.2d 129, 145 (1999). The authority relied upon by the plaintiffs neither cites to any state law that addresses a particular facility (Fircrest) or the size of its resident population. In fact, the population of Fircrest has declined steadily during the last decade. There is nothing to support that this issue has been addressed in the past, nor does it go beyond the two-year requirement because it only effects the 2003-2005 biennium. Moreover, the legislature delegated

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authority to the Secretary of DSHS to manage the DD programs and its facilities. The bill (ESSB 5404) merely confirms the delegation and directs DSHS to downsize during the current biennium. The enacted changes contemplated by the biennium, by its very definition, go no further than 2005. Therefore, the prohibition under Article II, section 19 of the state Constitution has not been violated as asserted by the plaintiffs. Finally, the plaintiffs have not cited to any authority in both state and federal law that confers a right upon a resident of an RHC to reside in a particular institution. While a resident is entitled to residential and habilitation services, there is no right for such an individual to pick in which facility he or she will reside. However, the individual residents currently (and in the past) have had the right to choose between an institutional placement in an RHC versus placement in a community-based program. It is not disputed that a resident cannot choose which RHC he or she will be placed in choosing the former. That is the current law.

The Secretary of DSHS has authority to manage the DD programs and their related facilities. The plaintiffs argue that the legislature acted outside or beyond its scope of authority to delegate this role to the Secretary. The secretary is and has been legislatively designated "executive head" of DSHS under RCW 43.20A.040. The Secretary was authorized to manage and govern such institutions, such as Fircrest, when the former Department of Institutions merged into DSHS when it was created in 1970. See, Ch. 18, Laws of 1970, Ex. Sess. Section 1. The Secretary has managed these institutions and the residents they serve for over thirty years. Fircrest School was authorized by law under RCW 71A.20.020, and the Secretary has authority to determine the residential capacities of each RHC, including Fircrest. See, RCW 71A.20.090. The plan proposed by DSHS and under attack by the plaintiffs has been and is well within the authority of the Secretary to determine both the increase or decrease of residential capacities within the state's RHCs.

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The final argument plaintiffs assert is that the involuntary movement of certain residents at Fircrest violates Article XIII of the state Constitution. Again, the plaintiffs claim that they will not be provided for as required under Article XIII, if they are forced to move to either another RHC or reside in a community-based placement (either of which they have a choice). There is a lack of information in the record for this the court to find that the enactment of ESSB 5404 fails to provide the residents/plaintiffs with "fostering" and "support" as required under Art. XIII. In fact, there are no experts who have provided declarations to support the plaintiffs' bald assertions that their wards will be injured or harmed or are even being deprived of state support, which would violate the protections of Article 13. It is not in dispute that the state provides $150,000 per year for each of the 1,050 residents of the state's RHCs. Chapter 25, Laws of 2003 1st Ex. Sess., Sec. 205. The biennium of 2003-2005 has not reduced the state's obligation under federal and state law to provide residential and habilitation services to the state's most vulnerable citizens. Therefore, there is a lack of evidence for this court to find that Article XIII has been violated.

The motion for summary judgment is hereby DENIED on all grounds.

Dated this ___ day of , 2004.

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Julie Spector, Judge

1. Capital Study of the DDD Residential Habilitation Centers Report 02-12, December 4,2002, p.4

2.Id.

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